

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Elon University,

Employer,

and

Case 10-RC-231745

Service Employees International Union
Workers United Southern Region,

Petitioner.

**PETITIONER'S OPPOSITION TO
ELON UNIVERSITY'S REQUEST FOR REVIEW**

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Petitioner, Service Employees International Union Workers United Southern Region (the “Union”), submits this brief opposing Elon University’s (“Elon”) Request for Review (“RFR”) of the Acting Regional Director’s (“ARD”) February 5, 2019 Decision and Direction of Election (“DDE”), and September 3, 2019 Decision and Certification of Representative (“DCR”).

The ARD’s decisions directing the election and rejecting Elon’s objections were clearly correct. With a single exception, the petitioned-for faculty are completely excluded from Elon’s system of shared governance. These faculty are not managers under controlling law or any conceivable legal standard. The petitioned-for unit is plainly appropriate under *PCC Structurals*. Elon frivolously seeks to fracture the unit, contrary to the Board’s recent decisions. Elon’s challenges to the eligibility formula and the rejection of its post-election objections are likewise completely devoid of merit. Elon’s request for review should be denied.

PROCEDURAL HISTORY

On November 29, 2018, Elon’s non-tenure-track undergraduate faculty filed a petition to hold a union election with the Union. Elon objected to the petition, claiming that all petitioned-

for faculty were “managerial” employees and that the proposed bargaining unit was inappropriate. A hearing was held on December 7, 12, 13, and 14, 2018.

On February 5, 2019, the ARD issued a DDE, finding in favor of the Union on all disputed issues. (Obj. Board Exhibit (“Obj. Bd. Ex.”) 1(b), p. 5.)¹ A mail ballot election was ordered in the following unit:

Including: All limited term, visiting, and adjunct faculty employees at Elon University teaching at least one credit-bearing undergraduate course in the Employer’s College of Arts and Science, School of Communications, School of Education, or Martha & Spencer Love School of Business.

Excluding: All other employees, all tenured and tenure-track faculty, all continuing track faculty, all lecturing track faculty, all employees teaching online courses only, staff with faculty rank, all administrators (including those with teaching assignments), managers, and supervisors as defined by the Act.

This unit is composed of three classes of employees: (1) “part-time” or adjunct faculty;² (2) limited-term faculty; and (3) visiting faculty. (Faculty classifications are discussed in detail in Facts Section III, *infra*.) At the hearing, the Employer’s list of current petitioned-for faculty included 135 adjunct faculty, 44 limited-term faculty, and 2 visiting faculty. (Employer Exhibit (“Er. Ex.”) 18; Tr. 144-50.) Unless otherwise specified, this brief addresses the part-time and limited-term faculty, collectively referred to by Elon as “temporary faculty.” Faculty excluded from the petitioned-for unit will be referred to as “permanent faculty.”

Ballots were mailed to voters on February 19, 2019, and counted on March 12, 2019. From the 283 eligible voters, 112 votes were cast for the Union and only 68 against. (Obj. Bd. Ex. 1(b), p. 1.) The final tally did not include 20 challenged ballots – 16 challenged by Elon, 2 by the Board, and 2 by the Union. (Id.)

¹ This brief refers to transcript and exhibits from both the pre-election hearing and post-election hearing on objections. Citations to the record from the hearing on objections will be distinguished by a “Obj.” For example, citations to the pre-election transcript are “Tr.”, while citations to the objections hearing transcript are “Obj. Tr.”

² The terms “part-time” faculty and “adjunct” faculty are used interchangeably in this brief.

On March 19, 2019, Elon submitted six objections to the election. A hearing was held on April 2, 2019. At the hearing, Elon withdrew its second objection. On May 13, 2019, the Hearing Officer recommended that all objections be overruled. Elon filed exceptions to the Hearing Officer's Report. On September 3, 2019, the ARD rejected each of Elon's objections and exceptions, finding that they "lack[ed] merit." (DCR at 4.)

On September 17, 2019, Elon filed its RFR of the ARD's determinations regarding (1) the non-managerial status of petitioned-for faculty; (2) the appropriateness of the bargaining unit; (3) the voter eligibility formula; and (4) Objections 4, 5 and 6.³ (RFR at 1-2.)

STATEMENT OF FACTS

I. Elon's Schools and Academic Programs.

Elon is a private university with its main campus located in Elon, North Carolina. (Tr. 32.) It is primarily an undergraduate institution with approximately 6,200 undergraduate students and 800 graduate students. (Tr. 32.)

The University is composed of six schools. (Tr. 31.) Four schools – the College of Arts and Science, School of Communication, School of Education, and Martha & Spencer Love School of Business (the "undergraduate schools") – focus on undergraduate programs, though they have a few graduate programs. (Id.) Of the undergraduate schools, the College of Arts and Science is the largest, employing 395 faculty, including 101 part-time faculty, 30 limited-term faculty, and 2 visiting faculty. (Er. Ex. 17.) The Business School has 91 faculty, including 20 part-time and 8 limited-term faculty. (Id.) The Communications School has 64 faculty including 8 part-time and 2 limited-term faculty. (Id.) The Education School has a total of 27 faculty with

³ Elon states at the outset of its RFR that it requests review of the ARD's finding that "stalking incidents carried out by union organizers did not interfere with employees' freedom of choice." (RFR at 1.) However, it does not address this objection later in its brief. Because Elon does not present any argument or evidence concerning this objection, it is not addressed in this brief.

5 part-time and 2 limited-term faculty. (Id.) Two schools – the School of Health Sciences and School of Law (the “graduate schools”) – only provide graduate programs. (Tr. 197.)

All four undergraduate schools are located in various buildings on Elon’s main campus. (Er. Ex. 10.) The undergraduate academic buildings are in close proximity to each other and interspersed with student housing. (Er. Ex. 10.) Some buildings are dedicated to a specific school (i.e. Ernest A. Koury Business Center), while others are multipurpose (i.e. Powell Building). (Er. Ex. 10.)⁴ Faculty teaching undergraduate students in one department may teach classes in buildings from different schools. For example, faculty in the Communications School teach courses in buildings that house departments within the Education School and College of Arts and Science. (Tr. 403-04.) Dr. Catherine Bush, a limited-term faculty in the College of Arts and Science, testified that she has taught biology courses in the Koury Business Center, which is part of the Business School. (Tr. 364-65.)

The four undergraduate schools work together to educate the same body of undergraduate students. Regardless of which school ultimately issues their major, all undergraduate students study a core curriculum provided by faculty spread across each of the four undergraduate schools. (Tr. 246-48.) Undergraduate courses often include a mix of students pursuing majors offered by each of the four undergraduate schools. Dr. Bush testified that she regularly teaches a “non-majors” biology course, Biology 101, that includes students from the College of Arts & Science, the Business School, the Communications School, and the Education School. (Tr. 364.) Adjunct Sharon Eisner from the Communications School teaches a public speaking course that is often taken by Business School undergraduate majors. (Tr. 405.)

Undergraduate faculty may also teach courses in more than one school. The Dean of the Education School offered two examples where a faculty member taught classes in both

⁴ See also Elon University Interactive Map, <https://www.elon.edu/assets/projects/map/>.

Education and in the College of Arts and Science. (Tr. 331-32.) Provost House recalled a professor in the College of Arts and Science teaching a course through the Business School. (Tr. 171.) In addition to communications classes, Eisner teaches “Elon 101,” a course offered to all first-year students. (Tr. 405-06.) Elon 101 is not managed by the School of Communications and is taught by faculty from all of the undergraduate schools. (Tr. 405-07.) Eisner has also taught courses cross-listed between departments in the Communications School and the College of Arts and Science such that they satisfy majors in both. (Tr. 407.)

The four undergraduate schools collaborate on interdisciplinary programs. Eisner testified she teaches “interdisciplinary studies” courses outside the Communication School where she primarily works. (Tr. 404-06.) In another example, the Education School works with the College of Arts and Science to offer a “science education” major that prepares undergraduates to teach science. (Tr. 335.) The major requires students to complete significant coursework in the Education School and a science department from the College of Arts and Science. (Tr. 335-36.)

The Education School has “coordinator/liaisons” to help facilitate interdisciplinary work with departments outside of the School, including the history, English, Spanish, and music departments. (Tr. 349-50.) For example, a student who wants to teach high school history will work with a history coordinator and take classes in the Education School and history department within the College of Arts and Science. (Tr. 351.) Even though these coordinators are faculty from other schools, they are being considered to represent the Education School on university committees due to their familiarity with the School. (Tr. 348.)

The two graduate schools are located separately from the undergraduate schools. (Er. Ex. 10.) The School of Health Sciences is located in the Gerald L. Francis Center, about a half-mile away from the main campus. (Er. Ex 10 (Building number 28.)) Elon’s Law School is located

off the main campus in Greensboro, North Carolina. (Tr. 30.) Graduate programs are subject to distinct policies and procedures that do not apply to undergraduate programs. For example, graduate programs have a different approval process for curriculum changes. (Er. Ex. 2, p. 223.)⁵ There is no evidence that faculty at the undergraduate schools use facilities in either of the graduate schools. And there is no evidence of collaboration or interchange between undergraduate and graduate schools.

II. The Administration of Elon University.

“Elon University is governed by a self-perpetuating Board of Trustees consisting of 41 people[.]” (Er. Ex. 2, p. 9.) Beneath the Board of Trustees is an extensive administration beginning with the President of Elon, Dr. Connie Ledoux Book. (Tr. 32.) The President is “the chief officer of the corporation and the University, charged with the duty of administering the affairs of the corporation and the University under the authority, direction, and control of the Board of Trustees.” (Er. Ex. 2, p. 92.)

Provost and Executive Vice President, Dr. Steven House, directly reports to the President. (Petitioner Exhibit (“Pet. Ex.”) 6, p. 3.) The Provost serves as the chief academic officer of the University and “is responsible for ensuring the academic quality of all departments, programs, and services within the academic affairs unit through the appropriation and allocation of necessary resources, through the oversight of hiring and evaluation activities, and through the establishment and coordination of policies and priorities.” (Er. Ex. 2, p. 82.)

The Provost “authorizes the creation and elimination of faculty and academic staff positions” and “retains ultimate responsibility over the management of budgets within academic

⁵ Unlike undergraduate programs, any graduate curriculum changes must be reviewed by the Graduate Council before reaching the University Curriculum Council. (Er. Ex. 2, pp. 191, 224.) Standing committees of the University are discussed at length in Section IV, *infra*.

affairs.” (Id.) The Provost also oversees admissions and development of Elon’s ten-year strategic plan for academic affairs, and reviews all academic policies to ensure that they are consistent with the University’s strategic plan and mission. (Id.; Tr. 33-34.)

Reporting to the Provost are several vice presidents, associate provosts, and academic deans. (Tr. 32-33; Pet. Ex. 6, p. 10; Er. Ex. 2, pp. 93-96.) Each school at Elon is led by a dean who is “responsible for overall direction of programs within their units.” (Er. Ex. 2, p. 81.) Deans make recommendations to the Provost regarding salary, promotion, continuance, and tenure, and administer funds provided by the University. (Er. Ex. 2, p. 82.) They also oversee a host of administrators within their respective schools, including approximately 30 department chairs, who are charged with leading departments within each school. (Er. Ex. 2, p. 81.)

III. Teaching Personnel Classifications.

The Faculty Handbook describes all faculty classifications and applicable policies. (Er. Ex. 2.) It is interpreted and enforced by the Provost. (Tr. 48.) Elon categorizes its faculty as either “permanent” or “temporary.” (Er. Ex. 1; Tr. 37.) Permanent faculty, also referred to as “full-time” faculty, include tenured, tenure-track, continuing-track, lecturing-track, and visiting faculty. (Er. Ex. 1; Tr. 37.) Temporary faculty include “part-time” or adjunct faculty, and limited-term faculty. (Er. Ex. 1.) At the time of the petition’s filing, there were only two visiting faculty at Elon. (Er. Ex. 18.)

A. Permanent Faculty

The hiring process for permanent faculty is coordinated by the Provost’s office. (Tr. 154.) The process is initiated when a department chair makes a position request to his or her respective dean. (Er. Ex. 2, p. 84.) The dean then seeks authorization from the Provost to commence a national search for a permanent faculty. (Tr. 198; Er. Ex. 2, p. 84.) The Provost

authorizes recruitment expenditures for the search. (Er. Ex. 2, p. 84.) The department chair then forms a search committee, which reviews and recommends candidates. (Er. Ex. 2, p. 84.) Both the department chair and dean conduct formal interviews with candidates. The dean approves the final selection of a candidate, which the dean then recommends to the Provost and President for final approval. (Tr. 199.)

All permanent faculty, with the exception of lecturers and visiting faculty, must have a terminal degree in their field. (Er. Ex. 1.) Permanent faculty have an expectation of continued employment with the University, serving multiple-year appointments that will be renewed should the employee meet performance expectations. (Tr. 42-43.) They are obligated not only to teach, but also to conduct research and engage in service to the University. (Tr. 42-44.)

Permanent faculty undergo a rigorous review process that generally includes some or all of the following: an annual self-review; an annual chair review; a second year mid-point review; a third year mid-point review; a probationary mid-point review; a post-probationary review; and a student evaluation. (Er. Ex. 2, pp. 114-16, 119.) At a minimum, all permanent faculty undergo an annual self-review, also referred to as a “Unit I” level review. (Er. Ex. 2, p. 114; Tr. 205-06.)

All permanent faculty, except for “visiting” faculty, must complete probationary periods of several years at the initiation of their employment. (Er. Ex. 1; Er. Ex. 2, pp. 58-60.)⁶ They are then eligible for a promotion to elevated status, resulting in greater job protection. (Id.) For example, tenure-track faculty have to serve a probationary period of 4, 5, or 6 years, after which they may be granted tenure. (Er. Ex. 1; Tr. 43.) Continuing and lecture-track faculty have similar probationary periods and promotion steps. (Er. Ex. 1; Tr. 43-44.) All tenured, tenure-

⁶ Although Elon describes visiting faculty as “permanent,” they do not have rank or opportunity for promotion within their job classification. (Er. Ex. 1.) According to Provost House, visiting faculty appointments were created so that departments can “try on” a faculty member. (Tr. 45.) Visiting appointments are for one year, with the ability to renew up to six years, though there is no expectation of renewal. (Tr. 45; Er. Ex. 1.) There are currently only two visiting faculty teaching at Elon. (Er. Ex. 18.)

track, continuing-track, and lecturer-track faculty receive health insurance, 403(b) retirement benefits with matching contributions, course releases, sabbaticals, travel funds, and research and development funds. (Er. Ex. 1.)

B. Temporary Faculty

“Temporary faculty” include all “part-time” faculty – also referred to as adjunct faculty—and limited-term faculty. (Er. Ex. 1.) In stark contrast to the hiring process for permanent faculty, the part-time and limited-term faculty are typically found through a local or regional search. (Tr. 155, 198.) The Provost’s office does not review temporary appointments. (Tr. 198-99.) Rather, the decision lies with the department chair, and in some cases, the dean. (Id.) No search committee is involved. (Tr. 198.)

Part-time faculty have semester-long contracts with no rank, no expectation of renewal, and no opportunities for promotion. (Er. Ex. 1.) Although they are all referred to as “part-time,” about 30-40 adjuncts teach a full-time load of 12 credit-hours per semester. (Tr. 36, 62.) Part-time faculty generally receive their contracts a few weeks before the semester. (Tr. 50.) Adjunct appointments for the Spring 2019 semester had not been set as of December 2019. (Tr. 197.)

Adjuncts may teach for several years on semester-to-semester appointments. Dr. Bush was originally hired in 2012, being told she was receiving a one-year limited-term appointment, though she formally received two separate one-semester contracts. (Tr. 386; Er. Exs. 28, 29.) Dr. Bush then taught as a part-time faculty for nine consecutive semesters. (Tr. 357.) Regardless of whether she was working under a limited-term or part-time appointment, Dr. Bush has always had the same work responsibilities. (Tr. 361-62.)

Limited-term faculty have year-long contracts without expectation of promotion or renewal. (Tr. 47.) Limited-term appointments may only be renewed for up to four years. (Tr.

48, 192.) After four years, the limited-term position is terminated. (Id.) The University typically hires part-time faculty to fill vacant limited-term positions. (Tr. 156, 200.) Like adjuncts, limited-term faculty pick up extra classes to earn more money. (Tr. 47.)

Provost House testified that both adjuncts and limited-term faculty are not expected to engage in research, but may have some service obligations. (Tr. 86.) However, it is unclear whether this happens in practice. Dr. Bush testified that she did not understand her limited-term appointment to carry service obligations. (Tr. 361, 372-73.) To the contrary, Dr. Bush was prohibited from taking on more mentoring responsibilities with students because of her temporary status. (Tr. 381.) Similarly, Eisner testified that she volunteered to serve on committees at her school but was rejected due to her adjunct status. (Tr. 401.)⁷ As discussed below, there is no evidence that any temporary faculty, with one exception on the Academic Council, serves on any committees discussed in the record.

Limited-term faculty and part-time faculty teaching at least 18 credit-hours per year receive health insurance benefits. (Er. Ex. 1.) Limited-term faculty receive 403(b) retirement benefits with matching contributions. (Er. Ex. 1.) The University asserted that part-time faculty are only eligible for 403(b) retirement benefits without match, but at least one faculty, Dr. Bush, testified that she received 403(b) retirement benefits with match while working as an adjunct. (Tr. 370.) Dr. Bush's contracts show that she received the same matching benefits as a part-time faculty and as a limited-term faculty. (Pet. Exs. 9, 10.)

⁷ Department Chair Marna Winters from the School of Education testified that she served on a school committee to develop curriculum for an early education major when she was an adjunct in 2009, and was required to attend departmental meetings while serving as a limited-term faculty in 2011. (Tr. 342-43.) Because these examples are from over five years ago, and regarding a faculty member not in the unit, they are irrelevant. Furthermore, participating in a school committee that designs a curriculum subject to management approval is not probative of the kind of decision-making power contemplated in *Pacific Lutheran*, especially given that other temporary faculty were expressly told they could neither vote nor participate in department-wide committees. (Tr. 401.)

Both part-time and limited-term faculty are required to have at least a Master's degree in their respective fields based on SACS accreditation standards. (Tr. 166.) Limited-term, but not part-time faculty, may be eligible for travel funds at a dean's discretion. (Er. Ex. 1.) All part-time and limited-term faculty, in contrast with their full-time counterparts, are ineligible for any research and development funds, course releases, and sabbaticals. (Er. Ex. 1.) Also unlike permanent faculty, part-time and limited-term faculty do not go through a formal evaluation process. (Tr. 207, 362; Er. Ex. 2, p. 143-45.) They only receive annual student evaluations. (Tr. 207, 362; Er. Ex. 2, p. 143-45.)

Temporary faculty in the undergraduate schools are all paid on the same wage scale. In 2017-18, the base rate for an adjunct teaching undergraduates was \$1,326 per credit-hour, with small increases based on degree held and longevity. (Pet. Ex. 8, p. 16.) For a 4-credit-hour course, the pay was \$5,304 to \$5,704. (Id.) Part-time faculty who taught 12 credit-hours in a semester were paid \$23,695 in 2017-18. (Id.) Limited-term faculty, who all teach 12 credit-hours each semester, were paid the same amount as part-time faculty with the same load. (Pet. Ex. 8, p. 16; Pet. Exs. 9-10.)⁸ All temporary faculty get a flat two-percent annual raise without any additional raise based on merit. (Tr. 88.)⁹ All terms and conditions of employment described above are uniform for faculty teaching undergraduate students across the four schools. (Tr. 190-96; Pet. Ex. 8, p. 16.)

Both the University and its employees have had difficulty determining whether a given temporary faculty member was considered "part-time" or "limited-term." In the list of faculty members attached to its original statement of position, Elon identified only nine employees as

⁸ For example, Dr. Bush's limited-term appointment letter shows she earned \$48,338 for the 2018-2019 year. (Pet. Ex. 10.) This is the same salary she made as a part-time faculty teaching 12 credit-hours per semester in 2017-18, except that the 2018-19 salary includes the two-percent raise. (Pet. Ex. 9.)

⁹ Permanent faculty are eligible for an additional merit-based raise. (Tr. 88.)

being “limited.” (Bd. Ex. 4.) It subsequently corrected that list, having concluded that numerous employees originally identified as “part-time” temporary faculty were misclassified, and were technically considered “limited-term” temporary faculty. (Tr. 181-84; Er. Ex. 18.) At the time of her hire, Dr. Bush had been told that she was receiving a “limited” appointment; in the hearing, the University introduced evidence indicating she was administratively considered a “part-time” at the time of her hire. (Tr. 384-88.)

C. Graduate Faculty

Elon’s policies differentiate between faculty teaching graduate students and those teaching undergraduates. Graduate faculty are paid on a separate, higher wage scale. (Tr. 250-53; Pet. Ex. 8, p. 16.) Law School adjuncts were paid \$2,100 per semester hour in 2017-2018, compared with \$1,326 for adjuncts teaching undergraduates. (Id.) Adjuncts in the School of Health Sciences are not paid by the credit-hour, and instead earned \$141.75 per “contact hour” in 2017-18. (Id.) Unlike undergraduate faculty, graduate part-time faculty must have a terminal degree, plus two years of teaching, and evidence of sufficient scholarship. (Er. Ex. 2, p. 49.) Faculty teaching graduate programs are recommended for hire by the director of the graduate program, not a dean, to the Provost. (Er. Ex. 2, p. 49.)

IV. Elon’s System of Shared Governance.

The Faculty Bylaws afford the “Faculty” of the University a variety of specific powers “to be exercised subject to review by and approval of the President and the Board of Trustees.” (Er. Ex. 2, p. 24; Tr. 54.) Any changes to the Bylaws must be approved by the Board of Trustees. (Tr. 54.) The Bylaws define the “faculty” as consisting of “the teaching faculty, administrators with faculty ranks and staff with faculty rank.” (Er. Ex. 2., p. 23.)

“Teaching faculty” include any faculty who have been given rank by the Board of Trustees. (Er. Ex. 2, p. 10.) “Teaching faculty status is limited to those whose performance assessment is linked to the completion of an annual Unit I [review].” (Id.) Provost House conceded that all teaching faculty must receive annual Unit I reviews. (Tr. 205-06; Er. Ex. 2, p. 10.) Part-time and limited-term faculty do not receive Unit I reviews. (Tr. 205-08; Er. Ex. 2, p. 143-45.) Part-time and limited-term faculty are thus not “teaching faculty” and are subsequently not included within the “faculty of Elon University.” (Tr. 207.)

Under the Bylaws, Elon’s “Academic Council” acts as a “coordinating committee of the Faculty[.]” (Er. Ex. 2, pp. 24-29.) The Council has 19 elected voting members that serve two-year terms, and three *ex officio* members: the President, the Provost, and the Chair of the University Curriculum Committee. (Er. Ex. 2, p. 24.) The Bylaws establish specific membership qualifications for each of the 19 elected seats. (Id.)

Of the 19 members, 18 positions must be filled by permanent faculty members of various ranks and positions. (Er. Ex. 2, p. 25-26.) The three at-large members of the Academic Council must hold the rank of Lecturer, Assistant Professor, Assistant Librarian or above. (Er. Ex. 2, p. 25.) The 15 divisional members serving on the Council must hold the rank of Senior Lecturer, Associate Professor, or above. (Id.) All at-large and divisional members must have taught at Elon for at least two full academic years. (Id.) Currently, all but one of the elected members serving on the Academic Council hold the rank of Senior Lecturer or above; none are temporary faculty members. (Pet. Exs. 1, 5.) There are no visiting faculty serving on the Council. (Id.)

Part-time faculty are prohibited from occupying all but one seat on the 19-member Academic Council. (Er. Ex. 2, p. 25.) The one part-time member of the council may be teaching either a part-time or full-time credit-load. (Id.) They must have taught at Elon for two

contiguous semesters. (Id.) Since 2012, the part-time member on the Council has almost always been Billy Summers. (Pet. Ex. 1.) During the 2015-2017 term, another adjunct, Leigh Ann Whittle, was elected to serve on the Council but did not finish out her two-year term because she left the University. (Tr. 215-16; Pet. Ex. 1.) There is no evidence that a part-time member has ever spoken during an Academic Council meeting, or ever substantively participated in any of the body's deliberations.

Although they are not considered part of the "faculty" of the University under the Bylaws, temporary faculty teaching more than 18 credit-hours in an academic year (all limited-term and some part-time faculty) are separately permitted to vote for Academic Council members. (Er. Ex. 2, p. 23.) There is no evidence regarding whether any temporary faculty member has ever actually voted for an Academic Council member. To the contrary, Dr. Bush testified that she did not know the Academic Council existed until she became involved in the present union campaign. (Tr. 376.)

In addition to the Academic Council, the Bylaws establish 14 "standing committees" involved with various components of university policy or campus life including the Curriculum Committee, Promotion and Tenure Committee, Academic Standing Committee, Core Curriculum Council, Faculty Research and Development Committee, Global Education Curriculum Committee, Graduate Council, Library Committee, Post-Probationary Faculty Development Review Committee, and Promotion and Tenure Committee. (Er. Ex. 2, pp. 31-46.)

The Committee on Committees, a subset of the Academic Council, is charged with ensuring that all standing committees comply with the membership requirements set forth in the Bylaws. (Tr. 119.) All standing committees have at least one administrator. (Er. Ex. 2, pp. 31-46.) Otherwise, membership is largely limited to "teaching faculty" or "faculty." (Id.)

Because both limited-term and part-time faculty are not considered to be part of the “teaching faculty” or the “faculty” under the Bylaws of the University, they are not eligible to serve on any standing committees. (Tr. 205-06, 210; Er. Ex. 2, pp. 31-46.) There are no temporary faculty currently serving on any of the standing committees. (Pet. Exs. 3, 5.) Provost House acknowledged that it would be “tough” for temporary faculty to serve on any committees, even if permitted by the Bylaws, given the brevity of their contracts. (Tr. 103, 219.)

The Curriculum Committee reviews curriculum proposals that come from various school-level curriculum committees—including separate curriculum committees for the Business, Communications, and Education Schools, and three separate curriculum committees within the College of Arts and Science. (Tr. 76-78, 219-20, 237-38.) There are no temporary faculty on the school-level curriculum committees. (Tr. 220; Pet. Ex. 3, pp. 8-11; Pet. Ex. 5.) Temporary faculty are precluded from serving on the University Curriculum Committee. (Tr. 219, 237.) Once a major or minor is approved by the University Curriculum Committee, it is sent to the Academic Council, which is not required to vote on the change. (Tr. 238.) Similarly, a new major or minor will be discussed at a faculty meeting. (Tr. 238-39.) The faculty may or may not vote on the change. (Id.) In cases where a new major will incur significant costs, the Board of Trustees must give approval before the development of any curriculum. (Tr. 65.)

In addition to the standing committees, Provost House also described a Budget Committee that plays a central role in overseeing the University’s budget. (Tr. 33.) The Budget Committee is chaired by the Provost, and composed of the Chief Financial Officer of Elon, the Assistant Vice President for Business, Finance, and Technology, a dean, and two fully tenured professors. (Tr. 122.) Temporary faculty cannot serve on the Budget Committee. (Tr. 33, 222.)

There is also a Strategic Planning Committee that works to develop a ten-year academic vision and plan for the University. (Tr. 126.) There are no temporary faculty on the Strategic Planning Committee. (Pet. Ex. 2.) The Long Range Planning Advisory Committee, chaired by the Provost, is charged with implementing the strategic plan. (Tr. 33-34.) Temporary faculty cannot serve on the Long Range Planning Advisory Committee. (Tr. 224-25.) As put by the Provost, “strategic planning and budget are primarily the role of the administration.” (Tr. 120.)

In addition to the standing committees, the Faculty Handbook establishes numerous advisory committees, including the Academic Service-Learning Faculty Advisory Committee; Experiential Education Advisory Committee; the Institutional Review Board; the Long Range Planning Advisory Committee; Teacher Education Committee; Tenure/Promotion Appeal Hearing Board; and the University Appeal Board. (Er. Ex. 2, pp. 200-22.) No temporary faculty serves on any of these committees. (Pet. Exs. 3, 5.)

The Academic Council, President, and Provost share the work of the standing committees and other administrative updates with the faculty during several “faculty meetings” each year. (Tr. 54-55.) No attendance is taken at these meetings. (Tr. 236.) There is no record of how many temporary faculty have ever attended these meetings, though Provost House testified that the number is small. (Tr. 173-74.) Votes are sometimes taken at the meetings. (Tr. 58.) Limited-term and part-time faculty with 18 or more credit-hours are eligible to attend and vote at these meetings. (Tr. 55.) Provost House described the votes as “all-say-aye” type votes where actual vote counts are not determined. (Tr. 58.)

Meetings may also be held at the departmental level. (Tr. 172-73.) Part-time and limited-term may or may not be invited. (Id.) Dr. Bush attended one department meeting and never returned because she felt that she was not welcome as a temporary faculty member. (Tr.

363.) Eisner attended a few department meetings after being hired at Elon but stopped going because she was ineligible to vote on matters. (Tr. 401.)

V. Communications with Faculty Before and During the Critical Period.

At the post-election hearing, the parties presented evidence on written and oral communications with faculty regarding the union organizing campaign.

Elon proffered several written communications between faculty about the union election. Non-tenure-track faculty signed onto a “Dear Colleagues” letter that described the working conditions they sought to improve and called for a union. (Obj. Er. Ex. 2.) The letter invited their faculty colleagues to “join our movement” and noted that they had asked union organizers to help them form a union. (Obj. Er. Ex. 2, p. 2.) Similarly, tenured and tenure-track faculty signed a letter of support addressed to President Book and Provost House, expressing support for non-tenure-track faculty forming a union and requesting that Elon’s administration remain neutral throughout the election process. (Obj. Er. Ex.4; Er. Ex. 10, p. 6.) These letters did not contain any threatening or coercive language. (Obj. Er. Exs. 2, 4.)

Elon also put into evidence an email from Billy Summers, an eligible voter and the single part-time member on the Academic Council, about the upcoming union election. (Obj. Er. Ex. 11.) The email described the mail ballot process and explained why Mr. Summers was voting “Yes” in the election. (Id.) It did not contain any threatening or coercive language. (Id.)

Julie Swanner, an adjunct instructor in the Business School testified that she thought Summers’ email was “inappropriate” because it was “telling [her] how to vote.” (Obj. Tr. 129.) Swanner also said that regarding “the rest of the email, I remember thinking, okay, well this is good to know that there’s going to be multiple envelopes. That’s really helpful because I’ve never voted in anything like this.” (Obj. Tr. 130.)

Elon presented an email from the “Elon Faculty Forward Organizing Committee” about the election. (Obj. Er. Ex. 9.) The email was sent from a union email address and signed by two faculty on behalf of the Committee. (Id.) The email stated in part: “We are so excited to announce that after a short legal delay, we officially have dates set for our union election at Elon University through the National Labor Relations Board. Can we count on you to vote yes for our union? If so, fill out this form and we’ll make sure your ballot gets to you.” (Id.)¹⁰

Swanner testified she thought this email was “inappropriate.” (Obj. Tr. 121.) She asked a colleague, “if I’m not going to vote yes, I’m not going to be sent a ballot?” (Obj. Tr. 122.) Swanner admitted that she understood that this email was sent by the Union. (Obj. Tr. 136.)

Swanner also received emails from the administration about the election and reviewed the administration’s Frequently Asked Questions (“FAQ”) website. (Obj. Tr. 137.) The FAQ website contained extensive information about the election process, including how to vote using a mail ballot. (Obj. Pet. Ex. 4.)¹¹ Swanner testified that she received her ballot and cast her vote. (Obj. Tr. 137-38.) Swanner did not indicate that she had any difficulty voting.

During the critical period, Elon engaged in an aggressive anti-union campaign, which included regular written communications from high-level administrators. Provost House sent several emails to all faculty regarding the union campaign. (Obj. Petitioner’s Exhibit “Obj. Pet. Ex.” 1.) On December 4, 2018, Provost House sent an email to all faculty stating, “I want to say clearly and without hesitation that I believe a union is not in the best interest of our faculty, our students or the future of our university.” (Obj. Pet. Ex. 3, p. 3.) On February 5, 2019, just 14

¹⁰ Swanner also noted that the emails from the organizing committee contained an “opt out” link, but Swanner did not opt out of these emails because she “wanted to stay abreast of what was happening.” (Obj. Tr. 132-33.)

¹¹ The Administration’s website also contained an “About the Vote” webpage, which had step-by-step instructions on voting with a mail ballot. (Obj. Pet. Ex. 3.)

days before the election began, Provost House emailed all faculty to “reiterate that President Book, all of Elon’s academic deans, and I oppose unionization at Elon.” (Obj. Pet. Ex. 3. p. 11.) Academic deans, including the Dean of the College of Arts and Sciences and Dean of the Communications School, also emailed faculty in their respective schools encouraging them to vote no in the union election. (Obj. Pet. Ex. 5; Tr. 171-74.) Finally, President Book emailed all faculty just four days before the election began, unequivocally stating, “I hope that you will vote ‘no’ on this union ballot.” (Obj. Pet. Ex. 3, p. 14.)

ARGUMENT

I. The Acting Regional Director Correctly Determined that the Petitioned-for Faculty Are Not Managerial.

The Board should deny Elon’s request for review of the ARD’s conclusion that the petitioned-for faculty are not managerial employees. Elon utterly failed to meet its burden of proving that petitioned-for employees are managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (hereinafter “*Yeshiva*”), or its progeny.

Elon’s temporary faculty are almost completely excluded from shared governance. With a single exception, there are no temporary faculty on any of the university or school-wide committee discussed in the record. Temporary faculty are prohibited from serving on all standing committees that conduct the work of shared governance. And they are prohibited from serving on all but one of the Academic Council’s 19 seats. They are even excluded from the definition of “faculty” in Elon’s governing documents. Given their almost complete exclusion from Elon’s governance system, the petitioned-for faculty are not managerial under *Yeshiva*, *Pacific Lutheran University*, 361 NLRB 1404 (2014) (hereinafter “*Pacific Lutheran*”), or any conceivable legal standard.

Moreover, there is no substantial reason for the Board to review or alter the *Pacific Lutheran* standard. Elon claims that the issuance of *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019) (hereinafter “*USC*”) requires the Board to “overrule or modify” *Pacific Lutheran*. (RFR at 2.) Not so. Contrary to Elon’s characterization, the D.C. Circuit in *USC* broadly endorsed the *Pacific Lutheran* standard though it rejected its particular application by the Board in *USC*, 365 NLRB No. 11 (Dec. 30, 2016). *USC* does not require this Board to review *Pacific Lutheran*. And even if it did, the undisputed facts in this case make it an inappropriate vehicle for such review.

A. *Pacific Lutheran* Articulates the Managerial Standard in Academic Settings Under *Yeshiva*.

Managers are excluded from the Act pursuant to Board policy because Congress deemed them “so clearly outside the [NLRA] that no specific exclusionary provision was thought necessary.” *NLRB v. Bell Aerospace Co. Division of Textron Inc.*, 416 U.S. 267, 284 (1974).

A party asserting managerial status has the burden of demonstrating that the employees in question “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *Id.* at 285, 288. Underpinning the managerial exemption is the “bedrock principle . . . that employers deserve the loyalty of employees who exercise discretionary authority over central employer policies.” *USC*, 918 F.3d at 136.

The standard for determining managerial status in an academic setting was first articulated in *Yeshiva*. In that case, the Supreme Court found that full-time tenured and tenure-track faculty were managerial employees because they exercised “pervasive” and “absolute” control over academic matters such as “what courses will be offered and when they will be scheduled, and to whom they may be taught . . . teaching methods, grading policies, and

matriculations standards . . . which students will be admitted, retained, and graduated . . . the size of the student body, the tuition to be charged, and the location of a school.” *Id.* at 679,686, 689. In other words, to be deemed managerial, faculty must exercise “effective recommendation or control” over central policies concerning “within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.” *Id.* at 686.

The Court was careful to point out that *Yeshiva* should not be interpreted to “sweep all professionals outside the [NLRA] in derogation of Congress’ expressed intent to protect them.” *Id.* at 690. It held that “[f]aculty are protected by the NLRA if their ‘decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned.’” *Id.* Applying this principle, the Court recognized that the Board might draw a “rational line” between “tenured and untenured faculty members.” *Id.* at 690 n. 31.

The Board set forth an analytical framework for evaluating whether faculty are managerial under *Yeshiva* in *Pacific Lutheran*. Under *Pacific Lutheran*, a party claiming managerial status must prove that the faculty in question exercise effective recommendation or control over five main areas of university decision-making: academic programs, enrollment management, finances, academic policy, and personnel policy. *Id.* at 1420. The first three areas are “primary” and accorded more weight because they “affect the university as a whole.” *Id.*

Under *Yeshiva*, the Board in *Pacific Lutheran* unanimously found that the petitioned-for, full-time, non-tenure-track faculty were not managerial. *See id.* at 1429 (“I agree with my colleagues that the record fails to support a finding that the contingent faculty members are exempt managerial employees.”) (Member Johnson, dissenting); *Id.* at 1444 (“I would ultimately reach the same conclusion: that the full-time contingent faculty here do not have managerial authority.”) (Member Miscimarra, dissenting).

In *USC*, the D.C. Circuit addressed as an issue of first impression whether *Pacific Lutheran* comports with *Yeshiva*. *USC*, 918 F.3d at 134. The court found that it did. However, it held that the Board misapplied *Pacific Lutheran* in that particular case by finding that a faculty subgroup may only exercise “effective control” in decisionmaking if they constitute a majority on shared governance committees. *Id.* at 127.

In this case, the facts clearly support the ARD’s conclusion of non-managerial status under *Yeshiva*, *Pacific Lutheran*, and the D.C. Circuit’s decision in *USC*.

B. The Petitioned-For Faculty Are Not Managerial Employees Under Any Conceivable Standard Because They Are Almost Completely Excluded from Shared Governance.

Elon argues that the ARD erred by improperly relying on the “majority status” principle used by the Board in *USC*. This argument mischaracterizes the ARD’s decision. The ARD did not find petitioned-for faculty to be non-managerial simply because they constitute a minority on shared governance bodies. Instead, he found that because petitioned-for faculty were almost completely excluded from shared governance, it was unnecessary, if not impossible, to evaluate their authority in the *Pacific Lutheran* areas.

The undisputed evidence in the record shows that petitioned-for faculty do not control any of the central policies of Elon, let alone exercise effective control over any of the five policy areas identified by *Pacific Lutheran*. Whether viewed through the lens of *Yeshiva*, *Pacific Lutheran*, *USC*, or any rational interpretation of “management,” the petitioned-for faculty at Elon are not managerial employees.

1. Petitioned-For Faculty Have No Control Over Academic Programs.

Under *Pacific Lutheran*, decisions in academic programs concern major “curricular, research, major, minor, and certificate offerings.” *Id.* at 1418. These “topic areas affect the very

nature of an academic institution, reflect its goals and aspirations, and clearly fall outside the routine discharge of a professor's duties." *Id.* at 1420. Changes in academic programming must be significant enough to "affect and necessitate a change to the university's organization and structure, such as the creation of a new department." *Id.*

At Elon, petitioned-for faculty do not play any role in decisions regarding academic programming at the school or university level. For example, they are completely excluded from the process for approving new majors and minors. A school curriculum committee is typically tasked with developing a curriculum for a new major. (Tr. 76-78, 219-20, 237-38.) The curriculum proposal is then presented to the University Curriculum Committee for approval. (*Id.*) No petitioning faculty serve on any of the school curriculum committees and temporary faculty are explicitly precluded from serving on the University Curriculum Committee. (Tr. 219-20; Pet. Ex. 3, pp. 8-11; Pet. Ex. 5.)

After receiving approval from the University Curriculum Committee, a curriculum proposal is sent to the Academic Council for review. (Tr. 78; Er. Ex. 8.) According to the Provost, the Academic Council is not required to vote on the curriculum proposal. (Tr. 238.) The proposal is then presented at a faculty meeting, and the faculty may or may not vote on the proposal. (*Id.*) Elon did not proffer any examples of majors that were voted on by members of the Academic Council or by the full faculty. (Tr. 239.) The only example described in the detail was the adoption of a new engineering major by University Curriculum Committee, which did not require a vote by the Academic Council or faculty. (Tr. 237-39.) That Elon could not present a single example of a petitioned-for faculty member voting or exercising any decision-making authority regarding curriculum at the school or university level underscores the complete exclusion of the petitioned-for faculty from decision-making.

2. Petitioned-For Faculty Have No Control Over Enrollment.

In assessing managerial authority, the Board also looks at whether faculty have authority concerning “enrollment management policies” including the size and scope of the incoming class. *Pacific Lutheran*, 361 NLRB at 1420. Provost House testified that the Budget Committee, which he is charged with leading, sets the size of the incoming class. (Tr. 124.) The Budget Committee is composed of four administrators and two fully tenured faculty. (Tr. 122.) Petitioned-for faculty cannot serve on the Budget Committee. (Id.) Thus they have no role in determining the size of the incoming class.

Provost House also briefly described the University Admissions Committee, which recommends standards for student admissions. (Tr. 89.) The Admissions Committee is composed of three administrators and four faculty. (Er. Ex. 2, p. 180.) None of the faculty members are temporary or visiting faculty. (Tr. 90, 220-21.) Provost House described the Admissions Committee as “not too active” because admissions is largely handled by administrators and staff. (Tr. 96.) Again, the record shows that the petitioned-for faculty are completely excluded from this area of decision-making.

3. Petitioned-For Faculty Have No Control Over Finances.

“The power to control or make effective recommendations regarding financial decisions – both income and expenditures – is one of the hallmarks of managerial control across all industries.” *Pacific Lutheran*, 361 NLRB at 1420. To be indicative of managerial status, decisions in this area must have “broad effects across a university,” like the setting of “net tuition,” for example. *Id.*

Provost House testified that finances are completely within the administration’s purview and described the Budget Committee’s role in that process. (Tr. 120.) The Budget Committee is

composed of the Provost, Chief Financial Officer, Vice President for Business, Finance, and Technology, a dean, and two fully tenured faculty. (Tr. 122.) Petitioned-for faculty cannot serve on the Budget Committee. (Tr. 33, 122.)

The Budget Committee receives requests from all academic units and non-academic units at Elon, including Athletics and University Advancement. (Tr. 122.) The President of Elon provides the Committee with certain guidelines that the Committee must operate within. (Tr. 122-23.) The Committee comes up with a budget proposal to distribute revenue within the President's guidelines. (Id.) This proposal is then discussed at a "budget forum" meeting for faculty feedback. (Tr. 123-24.) Elon did not provide any information regarding who attends the budget forum or whether any feedback is accepted. After the budget forum, the budget proposal is presented to the President and Board of Trustees for approval. (Id.)

Thus, the record shows that the petitioned-for faculty do not exercise any authority in this area of decision-making.

4. Petitioned-For Faculty Have No Control Over Academic Policy.

Under *Pacific Lutheran*, the Board considers whether faculty exercise control over academic policy decisions regarding "teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy." 361 NLRB at 1420. These determinations must "apply more broadly than the faculty's classroom[.]" *Id.*

Elon has a number of committees that apparently relate to academic policy, such as the Academic Standing Committee, University Curriculum Committee, school-level curriculum committees, Faculty Research and Development Committee, Elon Core Curriculum Council, Global Education Curriculum Committee, Graduate Council, Academic Service-Learning Faculty Advisory Committee, and Experiential Education Advisory Committee. (Tr. 98, 101,

103; Ex. Ex. 2, pp. 31-45, 200-22.) No petitioned-for faculty serve on these committees. (Pet. Exs. 3, 5.) Temporary faculty are expressly precluded from serving on these committees. (Tr. 98, 103; Er. Ex. 2, p. 117-21; Pet. Ex. 4.)

Academic policy is contained in Elon's Faculty Handbook, changes to which are approved by the Academic Council and reported to the full faculty. (Tr. 91-92.) Elon's only specific evidence regarding a decision in academic policy concerns the mid-semester grading policy. Provost House testified that some faculty expressed concern around the impracticability of administering mid-semester grades to students. (Tr. 69-70.) The Academic Council subsequently appointed a committee charged with examining the problem and issuing a proposal. (Id.) The makeup of that committee is unknown; there is no evidence it included temporary faculty. The committee proposed that, in lieu of grades, faculty should only administer mid-semester "assessments." (Id.) The proposal on mid-semester assessments was brought to the Academic Council for discussion, and was approved with a few "friendly amendments." (Id; Er. Ex. 3.) Minutes from the Academic Council discussion regarding the proposal did not show any participation by the part-time member. (Tr. 236; Er. Ex. 3.) The policy change on mid-semester grading was conveyed at a faculty meeting, but faculty did not vote on the change. (Tr. 236-37.) Therefore, petitioned-for faculty are excluded from this area of decision-making.

5. Petitioned-For Faculty Have No Control Over Personnel Policy.

In determining managerial status, the Board also evaluates faculty control over personnel policy and decisions, "including hiring, promotion, tenure, leave, and dismissal" when determining managerial status. *Pacific Lutheran*, 361 NLRB at 1420.

Elon proffered evidence regarding the Promotion and Tenure Review Committee, on which petitioned-for faculty are not permitted to serve. (Tr. 92-93; Er. Ex. 2, pp. 44-45.) The

Tenure/Promotion Appeal Hearing Board is similarly limited to tenured faculty, precluding participation by the petitioned-for faculty. (Er. Ex. 2, p. 218.) Provost House also testified about the Post-Probationary Review Committee, which was developed to enhance opportunities and support for post-probationary faculty including sabbaticals. (Tr. 94.) This committee is composed of seven faculty, five of which must have rank of professor, and two of which must be either senior lecturers or associate professors. (Er. Ex. 2, pp. 43-44.) Thus, petitioned-for faculty are excluded from the committees that administer and consider personnel policy.

6. The Single Adjunct Member of the Academic Council Does Not Transform All Temporary Faculty Into Managerial Employees.

In sum, Elon's managerial claim rests on the presence of a single part-time faculty member on the 19-member Academic Council, even though there are no petitioned-for faculty on any of the standing committees that perform all of the work of shared governance. But even if a single adjunct member on a single academic committee was somehow relevant, there is not even any evidence of the part-time member engaging in deliberations or exercising any decision-making authority within the Academic Council. Moreover, a single part-time member cannot wield any effective authority among 18 permanent faculty, especially when all of the substantive decisions are made by standing committees on which temporary faculty are explicitly prohibited from serving.

Elon also contends that the petitioned-for faculty exercise managerial authority because limited-term faculty and adjuncts teaching 18 credit-hours or more are eligible to vote at faculty meetings. Not so. Participating in *pro forma* votes among hundreds of other faculty at meetings that do not require attendance is hardly evidence of managerial status. *See Pacific Lutheran*, 361 NLRB at 1428 (rejecting the relevance of contingent faculty participation in faculty meetings that were simply "a conduit to transmit previously agreed-upon recommendations to the

administration”). And even if it did, there is no evidence of a single petitioned-for faculty voting at a meeting. Thus, the ARD correctly determined the petitioned-for faculty are non-managerial.

C. The D.C. Circuit Decision in *USC* Does Not Alter the *Pacific Lutheran* Standard and Is Not Cause for Review of This Case.

Elon contends this case deserves review by the Board because the D.C. Circuit decision in *USC* should prompt the Board to “overrule or modify” *Pacific Lutheran*. (RFR at 2.) This argument is meritless.

The D.C. Circuit in *USC* broadly endorsed *Pacific Lutheran*. The court stated that *Pacific Lutheran*, consistent with *Yeshiva*, “provides detailed standards for effective control, five precisely articulated decision-making areas, a list of the relevant factors within each area, and a prioritization of the areas.” *USC*, 918 F.3d at 141. The court held that “the Board’s categorization falls well within its discretion under the NLRA.” *Id.* The court held that *Pacific Lutheran* did not need to specify “exactly how many of the five decision-making areas over which faculty must exercise control in order to qualify as managerial” because “managerial status determinations do not lend themselves to ex ante line drawing or a mathematical exercise in box checking.” *Id.* at 141-42 (quotation marks and alternations omitted).

The court expressed agreement “with the Board that setting a high bar for effective control is necessary to avoid interpreting the managerial exception so broadly that it chips away at the NLRA’s protections.” *Id.* at 140. And it recognized that “[a]lthough the Court in *Yeshiva* emphasized the value of faculty collegiality, there may well be issues on which the interests of the [petitioning faculty] and the faculty as a whole differ so significantly that they cannot be reconciled even through collegial compromise.” *Id.* at 138. For example, “if [petitioning faculty] that the university expects to participate in a committee nonetheless fails to do so, this

may signal the presence of structural barriers to that group’s participation” and that there may be “something about the status of non-tenure-track faculty, especially part-time non-tenure-track, that effectively silences any managerial ‘voice,’ . . . that such faculty otherwise might possess.” *Id.* at 138-39.

Contrary to Elon’s characterization, the D.C. Circuit in *USC* only narrowly concluded that the Board in the *USC* case improperly “exten[ded]” a principle “hinted” at in a footnote of *Pacific Lutheran*. *Id.* at 127, 132 (referring to *Pacific Lutheran*, 361 NLRB at 1421 n.36). Specifically, the court found that the Board incorrectly applied *Pacific Lutheran* by holding that “a faculty subgroup seeking recognition exercises effective control over a decision-making area through its participation on a committee only when that subgroup constitutes a majority of the committee.” *Id.* at 135.

In rejecting the Board’s interpretation of *Pacific Lutheran*, the court emphasized that under *Pacific Lutheran* “the question the Board must ask is not a numerical one—does the subgroup seeking recognition comprise a majority of a committee—but rather a broader, structural one: has the university included the subgroup in a faculty body vested with managerial responsibilities?” *Id.* at 137. “For example, as in *Yeshiva*, does the university “require” faculty members to participate in committees?” *Id.* However, the court noted that in some cases “it may be unnecessary for the Board to consider whether a managerial faculty body exists because, even assuming one did, the petitioning subgroup is so clearly not included in it—because for example, university rules prohibit its participation in committees.” *Id.* at 139.

The court’s last hypothetical situation is precisely the case here. In this case, the petitioned-for faculty do not sit on any university or school-wide committees that comprise shared government, with the exception of a single part-time member on the 19-member

Academic Council. Elon's temporary faculty are "so clearly not included" in Elon's faculty governance because "university rules prohibit [their] participation in committees" that conduct such governance. *Id.* They are therefore plainly not managerial.

If anything, the *USC* decision urges this Board to leave the *Pacific Lutheran* standard intact. However, even if the Board wants to acknowledge the *USC* decision, there is no reason for the Board to take up this case to do so. The *USC* decision is only focused on the "majority status rule" improperly applied by the Board. That rule is not relevant here. Other than one person on the Academic Council, the petitioned-for faculty are completely excluded from shared governance. They do not sit on any school or university committees. They are expressly prohibited from sitting on the university's standing committees. And even if they could sit on committees, the limited duration of their contracts makes it practically impossible for them to do so. Therefore, Elon's request for review should be denied.

II. The Acting Regional Director Correctly Decided That the Petitioned-for Unit Is Appropriate.

The record plainly shows that the petitioned-for unit is appropriate under *PCC Structural, Inc.*, 365 NLRB No. 160 (2018). The petitioned-for unit is composed of all temporary faculty teaching undergraduate students at Elon. This unit falls along organizational bounds set by Elon, which differentiate between temporary and permanent faculty, and undergraduate and graduate faculty. Petitioned-for faculty share overwhelmingly similar terms and conditions of employment across job classifications and schools.

Nonetheless, Elon contends that the Board should review the ARD's decision regarding the bargaining unit. It argues that the petitioned-for unit should be fractured by school, and by job classification. If Elon had its way, one of the bargaining units would only consist of five

part-time faculty in the Education School. This is exactly the type of “fracturing” that *PCC Structural*s counsels against. This argument is frivolous and should be rejected.

A. A Unit Is Appropriate Where Petitioned-For Faculty Share A Community Of Interest Sufficiently Distinct From That Of Excluded Employees.

Where unit appropriateness is questioned, the Board shall determine “whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of excluded employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit.” *PCC Structural*s, Inc., 365 NLRB No. 160, slip op. at 5. The Board examines several criteria in evaluating whether a petitioned-for unit shares a community of interest, including:

“Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.”

United Operations, Inc., 338 NLRB 123, 123 (2002). In evaluating unit appropriateness, the Board is tasked with ensuring that units are not “arbitrary” or “fractured.” *PCC Structural*s, Inc., 356 NLRB No. 160, slip op. at 5. In *Boeing Co.*, 368 NLRB No. 67 (2019), the Board clarified the framework for applying *PCC Structural*s. “First the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared unit and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.” *Id.* at 3.

As the ARD did here, the Board has held that contingent faculty units are appropriate even where petitioned-for faculty are spread across several schools within a university. *See*

Univ. of San Francisco, 265 NLRB 1221, 1223 (1982) (finding unit of contingent faculty across schools was appropriate). In cases regarding the appropriateness of units encompassing faculty across different classifications, the Board has typically considered the dividing line to be between tenure-track and non-tenure track faculty. *New York Univ.*, 205 NLRB 4 (1973). Thus, as the ARD did here, the Board has approved units of faculty teaching part-time and full-time credit loads. *Carroll Coll.*, 345 NLRB 254 (2005); *Stephens Coll.*, 240 NLRB 166 (1979); *Pacific Lutheran*, 361 NLRB at 1404 n. 2 (2014) (declining to grant review of Regional Director’s determination that a unit of part-time and full-time contingent faculty was appropriate). And as the ARD did here, the Board has approved bargaining units that included undergraduate faculty, but excluded graduate faculty. *Goddard Coll.*, 216 NLRB 457 (1975).

B. The Petitioned-For Employees Share A Community Of Interest Across Job Classifications.

Employees in the petitioned-for job classifications share a community of interest distinct from that of excluded employees. First, all petitioned-for employees are organized separately from the excluded employees. The petitioned-for employees are categorized by the Employer as “temporary,” while the excluded classifications – lecturing-track, continuing-track, tenure-track – are designated as “permanent.” (Er. Ex. 1.) All petitioned-for employees are excluded from the definition of “faculty” in the Faculty Bylaws. (Er. Ex. 2, p. 23.) And they are all excluded from the definition of “teaching faculty” in the Faculty Handbook. (Er. Ex. 2, p. 10.) As described by Provost House limited-term faculty are naturally “partnered really with part-time” faculty. (Tr. 46.)

Although Elon describes the two visiting faculty in the petitioned-for unit as “permanent,” the record indicates that they are more akin to temporary faculty. Visiting faculty

do not have rank, probationary period, or opportunity for promotion within their job classification. (Er. Ex. 1.) Thus, like other temporary faculty, they do not have any path to job security. Provost House testified that visiting faculty appointments were created so that departments can “try on” a faculty member. (Tr. 45.) The appointments are for one year, with the ability to renew up to six years, though there is no expectation of renewal. (Tr. 45; Er. Ex. 1.) After six years of renewal, the position is terminated. (Id.; Er. Ex. 1.) Visiting faculty, like other temporary faculty, are only required to have a Master’s degree. (Er. Ex. 1.) Unlike other permanent faculty, they are ineligible to take sabbaticals. (Id.) There are currently only two visiting faculty teaching at Elon. (Er. Ex. 18.) One of those faculty lives abroad and is scheduled to retire at the end of her visiting appointment. (Tr. 264.) Neither of the visiting faculty sat on the Academic Council or any of its standing committees. (Pet. Exs. 3, 5.)

Second, all petitioned-for employees share similar skills and training. They are all required to have at least a Master’s degree. (Tr. 166.) By contrast, all excluded permanent faculty, with the exception of lecturers, must have a terminal degree. (Er. Ex. 1.)

Third, petitioned-for employees have the same primary job function: teaching undergraduate students. Dr. Bush testified that her job duties as a limited-term faculty are identical to those she had as an adjunct. (Tr. 361.) Unlike excluded faculty, temporary faculty are not required to complete research or serve on any committees. (Tr. 361, 381.) And there is no evidence that they do. (Id.)

Fourth, the petitioned-for faculty have significant job overlap, integration, and interchange. Dr. Bush, for example, has served as both an adjunct and limited-term employee. (Pet. Exs. 9, 10.) She has taught the same level classes as both an adjunct and limited-term employee. (Pet. Exs. 9, 10.) Provost House testified that Elon often hires part-time faculty into

limited-term positions. (Tr. 200.) Limited-term and adjunct faculty share the same job titles (i.e. an adjunct Assistant Professor can be a limited-term year-long appointment, or adjunct semester-appointment). In fact, the classifications are so indistinguishable, it is often unclear to even the Employer whether an employee is an adjunct or limited-term. *Compare* Bd. Ex. 4 (Attachment B) *with* Er. Ex. 18 (Amended Attachment B) (changing several faculty designations from “part-time” to “limited-term”); *see also* (Tr. 37, 386.).

Fifth, the petitioned-for employee classifications share similar terms and conditions of employment. All petitioned-for faculty, with the exception of two visiting faculty, are temporary and lack access to any promotional opportunities or rank. (Er. Ex. 1.) They receive similar appointment letters, (Pet. Exs. 9, 10), and are eligible for most of the same benefits (Er. Ex. 1). Limited-term and part-time faculty receive the exact same pay for teaching a full-credit-load. (Pet. Ex. 8, p. 16; Pet. Exs. 9, 10.) Part-time faculty receive health insurance if teaching 18 credit-hours or more. (Er. Ex. 1.) All temporary employees are ineligible for course releases, sabbaticals, and University research and travel funds provided to permanent faculty. (Id.)

Sixth, all petitioned-for faculty report through the same supervisory structure. Limited-term, part-time, and visiting faculty all report to their respective department chairs, who in turn report to an academic dean. (Tr. 153-54.) All academic deans report to the Provost. (Tr. 33.) Unlike the excluded faculty, temporary faculty do not receive formal annual evaluations involving the dean or department chair. (Tr. 315-16, 362; Er. Ex. 2, p. 143-44.) Instead, they only receive student evaluations. (Id.) Limited-term and part-time faculty are hired through local searches, while permanent faculty are hired through national searches requiring authorization from the Provost. (Tr. 155, 198.) Permanent faculty hires must be approved by a

department chair, dean, and the Provost. (Tr. 198-99.) Temporary hires typically only require approval from the department chair, and in some cases, a dean. (Id.)

Finally, all petitioned-for faculty are largely precluded from serving in shared governance and other university committees. With the exception of one part-time seat on the Academic Council, no petitioned-for faculty serve on any university-wide committees. (Pet. Ex. 4.) The record demonstrates that the employees comprising the petitioned-for unit share terms and conditions of employment in sharp contrast with those of the permanent faculty excluded from the unit. Thus, the petitioned-for unit is plainly appropriate.

Nonetheless, Elon contends that the ARD erred because he “completely ignored the special considerations of a private university setting” as required by *Boeing Co.*, 368 NLRB No. 67 at 3. However, Elon does not offer any support for its argument. To the contrary, the ARD’s finding is consistent with other Board decisions regarding faculty bargaining units. *See e.g.*, *Univ. of San Francisco*, 265 NLRB at 1223 (1982) (finding unit of contingent faculty across schools was appropriate); *New York Univ.*, 205 NLRB 4 (1973); *Carroll Coll.*, 345 NLRB 254 (2005); *Stephens Coll.*, 240 NLRB 166 (1979); *Pacific Lutheran*, 361 NLRB at 1404 n. 2 (2014) (approving units encompassing full-time and part-time contingent faculty); *Goddard Coll.*, 216 NLRB 457 (1975) (approving unit including undergraduate faculty but not graduate faculty).

Instead of pointing to any Board precedent to the contrary, Elon cites to *Minnesota College of Art and Design*, Case 18-RC-182546 (2016), a decision made by a Regional Office, issued prior to *PCC Structural*s, and based on the unique working conditions of faculty at a private arts school. This case is utterly irrelevant to Elon’s argument and in no way shows the ARD failed to account for the university setting when upholding the petitioned-for unit as appropriate.

C. The Petitioned-For Employees Share A Community Of Interest Across Schools.

Elon claims that the petitioned-for unit is inappropriate because faculty across schools lack a community of interest.¹² This argument is absurd. The Union has petitioned for a wall-to-wall unit, encompassing all of the temporary and visiting faculty who provide instruction to Elon's undergraduate student body. This is plainly an appropriate unit.

Regardless of the school in which they are housed, all employees in the unit perform the same type of work: teaching a single body of undergraduate students. (Tr. 202-03.) They work under the same terms of employment: the University sets universal terms regarding pay and benefits, and issues identical contracts to faculty regardless of their school or department. (Tr. 189-96.) They must have the same basic qualifications: each must hold at least a Master's Degree, must be an excellent teacher, and need not engage in scholarship. (Tr. 166, 202-03.) They work in the same location: a small undergraduate campus in buildings often shared between various schools and departments. (Er. Ex. 10; Tr. 403-04.) They have the same relationship to the University: they are not considered part of the University's "faculty," they have almost no voice in faculty governance, and they all report within the same supervisory structure. (Tr. 207.) Thus, the petitioned-for unit directly tracks Elon's own organizational structure, includes all similarly situated employees, and is undeniably appropriate.

In attempting to fracture the unit into several micro-units, Elon has advanced positions that are irrelevant, illogical, and unsupported by the factual record. First, Elon has suggested that the four schools must be separated because they have different buildings on campus. But this

¹² This argument should not be considered as it is untimely and was not raised in Elon's initial Statement of Position. (Bd. Ex. 4.) The original petitioned-for unit encompassed the same faculty classifications across the four schools. Elon thus waived its opportunity to make this community of interest argument by failing to raise it in its original statement of position.

argument simply ignores that these buildings are all on a shared campus, in close proximity to one another. (Er. Ex. 10; Tr. 151-53.) And it ignores that temporary faculty can and do move freely throughout these buildings. Dr. Bush has taught multiple classes in Business School buildings, (Tr. 364-65); adjuncts in the School of Communication teach classes in Education and Arts and Sciences buildings, (Tr. 364-65); and temporary faculty are invited to speakers, trainings, meetings, or other campus events held in any number of campus locations, (Tr. 123, 174-75, 410-12.)

Second, Elon has suggested that the schools should be separate because some schools hire some adjuncts because of their relevant professional experience. To the extent this is a relevant consideration, it is common across all four schools. The music department hires some adjuncts with professional experience performing music, (Tr. 243, 258-59), the Business School hires some adjuncts with professional experience in the business world, (Tr. 146, 243-44), and the Education School hires some adjuncts with professional experience in teaching, (Tr. 161.) More problematically, this position ignores that the employees are required to have the same basic qualifications across all four schools, as set by the University. All temporary, undergraduate faculty must have a Master's degree. (Tr. 166.) They must all be excellent teachers. (Tr. 293.) They are not required to have performed scholarship. (Tr. 202-03.)

Third, Elon attempts to argue that each school is somehow a stand-alone entity, with little relationship to the other three schools. This argument is unsupported by the facts. There is significant overlap, integration, and interchange across the four undergraduate schools. Faculty across all four schools provide Elon's "core curriculum," which must be taken by Elon's undergraduates regardless of which major they ultimately pursue. (Tr. 246-48.) Adjunct faculty teach students pursuing degrees from each of the four schools, regardless of the adjunct's home

school or department. (Tr. 246, 364, 403; 406.) Faculty from the College of Arts and Science have taught courses for the Business School, (Tr. 171), while adjunct faculty from the School of Education and the School of Communications have taught courses for departments within the College of Arts and Science, (Tr. 331-32, 407.) Eisner teaches courses formally labeled “Interdisciplinary Studies,” which are highly recommended for business school students, and which are not managed by Eisner’s technical home in the School of Communications. (Tr. 404-06.) She also teaches “Elon 101,” a class for all first year undergraduates, that is also not housed within the School of Communications and is instead taught by faculty from all four of the undergraduate schools. (Tr. 405-06.) Given that all of the faculty in the petitioned-for unit are involved in educating a single group of undergraduate students, it is unsurprising that there is significant overlap and integration between their various responsibilities.

Fourth, the Employer elicited evidence suggesting that some faculty do not regularly interact with employees outside their home school or department. This again mischaracterizes the relevant facts. Petitioned-for faculty regularly interact with each other as part of Elon’s undergraduate community. They can attend university-wide trainings, speakers, meetings, and social events together. (Tr. 123, 173, 409-11.) They rely on administrative support provided by faculty and staff housed in other departments when teaching courses in those schools’ buildings. (Tr. 403-04.) Eisner testified that she met faculty from other undergraduate schools during trainings required for teaching “Elon 101,” at Elon-sponsored student birthday parties, and at guest speaker events on campus. (Tr. 409-11.)

Fifth, Elon asserts that the undergraduate schools all have different accreditation standards. This is irrelevant. All schools must meet the same SACS accreditation standards. (Tr. 188.) Beyond these standards, some schools and departments may seek additional

accreditation. For example, the chemistry department has a separate accreditation from the rest of the College of Arts and Science. (Tr. 244.) Nonetheless, Elon does not argue that faculty in the chemistry department should be in a separate bargaining unit. A school or department's willingness to seek an accreditation does nothing to break the community of interest shared between members of the petitioned-for unit.

Finally, Elon again contends that the ARD did not take into account the university setting when issuing his decision that a unit encompassing all undergraduate schools is appropriate. Elon cannot cite to any Board law supporting its position. Instead, its entire argument hinges on a Regional Office decision in *Vanderbilt University*, Case 10-RC-193205 (2017). In that case, the Regional Director found that the petitioned-for faculty bargaining unit was inappropriate because it only encompassed five out of six undergraduate schools. In this case, however, the unit encompasses *all* undergraduate schools. Furthermore, *Vanderbilt* is not instructive because it was issued at the Regional level and decided before *PCC Structural*s.

The petitioned-for wall-to-wall unit, encompassing all of the temporary and visiting faculty who provide instruction to Elon's undergraduate student body, is plainly an appropriate unit. Elon provides no compelling reason for review and instead expresses mere disagreement with the ARD's decision. Its request for review should be denied.

III. The Acting Regional Director Was Correct In Adopting A Look-Back Formula.

Elon contends that the Board should review the eligibility formula adopted by the ARD and asserts that he was "obligated to follow the eligibility formula set forth in *C.W. Post Center of Long Island University*, 198 NLRB 453 (1972)." (hereinafter "*C.W. Post*") (RFR at 37.) This argument is meritless. To determine voter eligibility, the Board must "strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who

have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment.” *Columbia Univ.*, 364 NLRB No. 90, slip op. at 22 (2016).

The ARD’s voter eligibility formula in this case, based on an academic calendar year, is appropriate and common in the university setting. Because the majority of the petitioned-for employees teach on semester-long contracts, the proposed eligibility formula strikes a reasonable balance between enfranchising voters and ensuring that voters have an ongoing connection with the unit. (Er. Ex. 18.) Numerous faculty elections have used voter eligibility formulas similar to the Union’s proposal.¹³

Elon does not proffer any good reason for revisiting the ARD’s voter eligibility formula. In support of its position, Elon mischaracterizes the holding of an almost forty-year-old case, *C.W. Post*. (RFR at 37.) *C.W. Post* holds that voter eligibility formulas are appropriate in adjunct faculty elections. It does not suggest that all part-time faculty elections must be conducted according to the precise formula developed by the Board based on facts unique to that particular case. *Id.*¹⁴ This is reflected in the diversity of eligibility formulas used in higher education elections, the majority of which do not mirror the formula used in *C.W. Post*.¹⁵

¹³ *Antioch University Seattle* (19-RC- 128561); *Brandeis University* (01-RC-163352); *California College of the Arts* (32-RC-134175); *Georgetown University* (05-RC-100905); *Laguna College of Art & Design* (21-RC128268); *Lesley University* (01-RC-118179); *Maryland Institute College of Arts* (05-RC-123986); *McDaniel College* (05-RC-175386); *Mills College* (32-RC-125058); *Northeastern University* (01-RC-124413); *Otis College of Art & Design* (31-RC-139991); *San Francisco Art Institute* (20-RC-126147); *Siena College* (03- RC-150383); *The College of St. Rose* (03-RC-133447); *Trinity Washington* (05-RC-151107); *Tufts University* (01- RC-109106); *Washington University* (14-RC-141308).

¹⁴ Elon also cites to a single decision issued by another Regional Director in *Minneapolis College of Art and Design* (18-RC-182546). This case is not controlling authority, and is an anomaly when compared to the other higher education elections cited above.

¹⁵ Elon also frivolously claims the ARD’s voter eligibility formula was improper because it included faculty who taught during the Winter Term, which supposedly created the “odd situation that an individual who was not employed at the time of the filing of the Petition on November 30, 2018, nor on February 19, 2019 when the ballots were mailed, had a right to vote in the election.” (RFR at 38.) There

Elon proffers no valid grounds for reviewing the voter eligibility formula adopted by the ARD. Its request for review should be denied.

IV. The Acting Regional Director Correctly Denied Elon’s Objections to the Election.

Elon argues that, even if the Board declines to take up review of the DDE, it should nonetheless grant review of the ARD’s decision to overrule Elon’s objections and certify the unit. Specifically Elon contends that the ARD erred in finding that (1) a “Dear Colleagues” letter signed by a handful of tenured professors and the single part-time member on the Academic Council was not coercive; and that (2) a single email sent out by the union organizing committee did not constitute a misrepresentation of the Board’s voting process. (RFR 38-43.) Elon does not identify any factual or legal error committed by the ARD, or any other basis warranting review.

A. To Set Aside An Election, Objectionable Conduct Must Be Severe and Pervasive Enough to Affect the Result of the Election Given the Margin of the Vote Count.

“It is well settled that ‘[r]epresentation elections are not lightly set aside.’” *Safeway, Inc.*, 338 NLRB 525, 525 (2002) (quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991)). “There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Id.* (quoting *Hood Furniture*, 941 F.2d at 328). Thus, “the burden of proof on parties seeking to have a Board-supervised election set aside is a ‘heavy one.’” *Id.* (quoting *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)).

Generally, the Board only evaluates objectionable conduct occurring during the “critical period” between the times of the filing of a petition and a union election. *Goodyear Tire &*

is nothing “odd” about this situation. The Board’s eligibility formula in *C.W. Post* similarly allowed faculty not currently teaching to vote.

Rubber Co., 138 NLRB 453, 454 (1962). It does not consider “conduct too remote to have prevented the free choice” in an election. *Ideal Elec. Mfg. Co.*, 134 NLRB 1275, 1277 (1961).

The Board uses an objective test to determine whether alleged objectionable conduct “ha[d] the tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995); *Baja’s Place, Inc.*, 268 NLRB 868, 868 (1984). Relevant factors include:

(1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the union.

Avis Rent-A-Car-System, 280 NLRB 580, 581 (1986) (overruling objection because election was not close and there was no evidence a substantial number of voters knew of or were affected by the relatively minor misconduct).

Notably, the Board evaluates objectionable conduct in light of the closeness of the final vote, and whether the alleged misconduct could have actually affected the result of the election. *See Sanitation Salvage Corp.*, 359 NLRB 1129, 1129 (2013) (refusing to set aside election when petitioner lost by a wide margin and the employer’s misconduct only affected two employees); *Werthan Packaging*, 345 NLRB 343, 345 (2005) (overruling objections where union lost election by 21 votes and employer’s misconduct only affected five employees).

In this case, Elon has not produced any evidence whatsoever of objectionable conduct. All of the meetings and communications described by Elon’s witnesses were completely lawful. And Elon has failed to prove the complained-of conduct was so inappropriate and pervasive that

it meaningfully affected the outcome of the election, which had 112 ballots cast for the Union and only 68 against. The ARD thus correctly rejected Elon's objections.

B. Tenured and Tenure-Track Faculty Did Not Engage in Any Objectable Conduct.

Elon alleges the ARD erred in rejecting its argument that the election should be set aside because eligible employees were coerced by "managerial" tenured and tenure-track employees. This objection is completely meritless.

Notably, in its RFR, Elon does not expressly argue that any supervisors engaged in pro-union conduct. Rather it appears to argue that "[w]hile isolated Union support by a few low level supervisors may not be objectionable . . . it is clear that support from multiple "managers" with positions of influence with respect to the issues important to the voting members of the unit constitutes objectionable conduct." (RFR at 40.) Elon's argument is fatally flawed for several reasons.

First, there is no authority for finding pro-union speech by non-supervisor managers to be objectionable conduct that warrants setting aside the election. Non-supervisor managers are treated differently than direct supervisors because "the supervisor, not higher management, has immediate and day-to-day control over the working life of the employee," and thus can exert coercive pressure on a voting employee. *Harborside Healthcare*, 343 NLRB 906, 914 (2004).

Indeed, it is expected that an employer will express its position on unionization through its management. Elon was no exception, as shown by the numerous anti-union emails from Elon's President, Provost, and deans. If pro-union or anti-union statements by non-supervisory managers were objectionable, clearly it would be Elon's administration and not its tenured faculty that engaged in objectionable conduct.

Second, the only evidence of conduct by tenured and tenure-track faculty proffered by Elon was a single letter written in support of non-tenure track colleagues organizing to form a union. The letter was addressed to the administration and not to eligible voters. The letter merely stated that the signatories “support our part-time adjunct and full-time non-tenure track colleagues’ efforts to unionize” and asked Elon’s administration “to respect our colleagues right to form a union with SEIU.” (Obj. Er. Ex. 10, p. 6.) This single, non-threatening communication is not objectionable conduct, regardless of whether tenured faculty are deemed managers.

Third even if the letter were somehow objectionable, the conduct was vastly overshadowed by the aggressive and pervasive anti-union campaign carried out by Elon’s administrators.

C. The Single Part-Time Member of the Academic Council Did Not Engage In Any Objectionable Conduct.

Elon alleges that the ARD erred in overruling its objection that the election should be set aside because members of the Academic Council supposedly “pressur[ed] employees to sign union authorization cards, distribut[ed] pro-union literature, [and] allowed their signatures to be used in pro-union literature by the SEIU for campaign publicity purposes.” (Obj. Bd. Ex. 1(a), p. 3.) This objection is completely meritless.

Elon put forward evidence that three current Academic Council members – Tom Green, Jason Kirk, and Rosemary Haskill – signed the tenured and tenure-track letter of support discussed above. (Obj. Tr. 151-52; Obj. Er. Ex.4; Obj. Er. Ex. 10, p. 6.) Elon did not produce any evidence that these Academic Council members were distributing pro-union literature or handing out union authorization cards as stated in its objection.

Again, the mere signing of the single letter of support, even if performed by managers, is clearly not objectionable. Thus, even assuming *arguendo* that the Academic Council members are managerial employees, their conduct does not warrant setting aside the election. Elon does not allege that the Academic Council members are supervisors and does not allege any pro-union supervisory conduct.

Elon also submitted evidence on written communications from Billy Summers – the sole part-time faculty member on the Academic Council – to eligible voters. Elon pointed to Summers’s signature on the Dear Colleagues letter signed by non-tenure-track faculty in support of forming a union. (Obj. Er. Ex. 2.) Elon also presented a single email from Summers to the “facstaff” listserv with helpful voting instructions and encouraging faculty to vote “yes” for a union. (Obj. Er. Ex. 11.) Summers’s conduct is plainly lawful for several reasons.

First, Elon does not allege Summers is a supervisor. There is absolutely no evidence that he has any supervisory authority. Indeed, all of the faculty who testified about Summers said that they did not know who he was prior to the union campaign. (Obj. Tr. 74, 131.)

Second, Elon failed to prove that Summers a manager. *See* Section I.B, *supra*. Thus, all that Elon alleges is that Summers – an eligible voter who is neither a supervisor nor a manager – reached out to his co-workers about the union. Such conduct is perfectly lawful.

Third, even if Summers’s conduct was somehow deemed objectionable, Elon did not bear its burden of establishing that Summers was an agent of the Union under common law principles of agency. *See Millard Processing Servs.*, 304 NLRB 770, 771 (1991) (“The burden of proving any type of agency rests with the party asserting that relationship.”); *Cooper Indus.*, 328 NLRB 145 (1999). It is well settled that agency is not established by virtue of attending organizing meetings, serving on an organizing committee, or by engaging in active support of a union. *See*

e.g., Health Care and Ret. Corp. of Am. v. NLRB, 255 F.3d 276, 281 (6th Cir. 2000); *Utd. Builders Supply Co.*, 287 NLRB 1364, 1365 (1988). Without evidence that Summers acted with apparent or real authority on behalf of the Union, his activities must be evaluated under standards for third party conduct. Third party conduct is only objectionable when it creates a “general atmosphere of fear and reprisal that renders a fair election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Summers’s signature on a letter to colleagues and friendly email with voting instructions comes nowhere near this high bar.

Finally, Elon asserts that Summers engaged in objectionable conduct by soliciting authorization cards prior to the filing of the petition. (RFR at 39.) There is no evidence in the record to support the assertion that Summers collected authorization cards. And even if he did, it is not objectionable because he is not a supervisor, and his conduct occurred well before the critical period. *Goodyear Tire & Rubber Co.*, 138 NLRB at 454.

D. The Union Did Not Engage In Objectionable Conduct When It E-mailed Voters.

Elon requests review of the ARD’s determination that an email sent by the Union to eligible voters was not objectionable. The email – which was signed by the Organizing Committee and sent from a union email address – said: “Can we count on you to vote yes for our union? If so, fill out this form and we’ll make sure your ballot gets to you.” The ARD’s rejection of Elon’s objection over the email was undoubtedly correct.

It is well established that misrepresentations made during a union election campaign do not constitute grounds for setting aside an election. *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 131 (1982). This includes misrepresentations about the Board’s neutrality. *Riveredge Hosp.*, 264 NLRB 1094, 1094 (1982). For example, in *TEG/LVI Environmental Services, Inc.*, 326

NLRB 1469 (1998), the Board held that the union did not engage in objectionable conduct when it sent employees a flyer stating: “The National Labor Relations Board of the United States of America wants the workers of TEG/LVI environmental services to have a union.” *Id.* at 1469. In its reasoning, the Board found that “the document did not purport to be an official Board document, but was rather clearly identified as one distributed by the union. The Board has long held that employees are capable of evaluating propaganda for themselves.” *Id.* (citing *SDC Inv.*, 274 NLRB 556, 557 (1985)). By contrast, false representations by an employer or union that they are the Board or acting with the authorization of the Board are grounds for setting aside an election. *See e.g., Goffstown Truck Ctr, Inc.*, 356 NLRB 157, 158 (2010) (setting aside election where union organizer visited employees at home and falsely claimed to be a Board agent sent to ascertain the how employees would vote).

Here, Elon objected to an e-mail sent by Petitioner on the grounds that it was misleading and indicated the Board was biased in favor of the Union. However, the text of the email does not state anything about the Board’s neutrality or purported lack thereof. And even if it did, it is well established that misleading statements about the Board’s neutrality is not objectionable unless a party is falsely claiming to be the Board or acting under the authority of the Board. Here, the e-mail at issue was clearly sent by the Petitioner. It was sent from an “@seiufacultyforward.org” email address and signed by three faculty members “On Behalf of the Elon Faculty Forward Organizing Committee.” (Obj. Er. Ex. 9.) There was nothing in the email that would lead any reasonable person to believe that it was from the Board. And Elon’s own witness, Julie Swanner, admitted that she understood the e-mail was from the Union. (Obj. Tr. 136.) Therefore, there is nothing objectionable about the email.

In sum, Elon does nothing more than express its unwarranted dissatisfaction with the ARD's Decision and Certification. Neither the facts nor the law support Elon's various positions. There are no grounds warranting the Board's review of those decisions. Elon's request should be denied.

CONCLUSION

For the foregoing reasons, Petitioner requests that Elon's request for review of the ARD's Decision and Direction of Election and Decision and Certification of Representative be denied.

Respectfully submitted, this the 24th day of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically via the National Labor Relations Board's e-filing service, and was served on counsel for the Employer via e-mail to the following:

Robert O. Sands
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Dated: September 24, 2019.

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